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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 503 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

FARUQ YUSUF BHOLAT

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 503 of 1996

MR MM TIRMIZI for Petitioner No. 1-2

MR ND GOHIL APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 03/08/2001

ORAL JUDGEMENT

#. The appellants-accused have filed this appeal against

the judgment and order of conviction and sentence dated 20.5.1996 passed by the learned Additional Sessions Judge, Surat in Special Case No.6 of 1995 whereby the appellants-accused were convicted for the offences under Sections 376, 506(2) IPC and Section 3(1)(11) of Atrocity Act and sentenced them to suffer 7 years R.I. and to pay fine of Rs.500/= in default to further undergo 2 years R.I. for the offence under Section 376 IPC, 3 years R.I. for the offence under Section 506(2) IPC and 3 years R.I. and to pay fine of Rs.250/= in default to further undergo R.I. for 6 months for the offence under Section 3(1)(11) of Atrocities Act. All the substantive sentences were ordered to run concurrently.

#. As per the prosecution case, on the date of incident prosecutrix Sunderben, who was below 16 years had gone to the house of Yakubbhai to see movie. While seeing movie, she had gone out to answer the call of nature outside the house of Yakubbhai. It was dark. At that time both the accused took her away in the field. When she tried to escape she was given threat to kill. After taking her in field, first accused Faruq and then second accused Gulam committed rape on her. While going away they threatened her that if she tells about this incident to anyone, then they will kill her. Thereafter, she left for her house. At that time her mother was sleeping. She woke up her mother and informed about the incident. On the next day they went to Kosamba Police Station and lodged FIR Exh.12. After registering the case, the police arrested both the appellants-accused for the aforesaid offences. On completion of investigation both the accused were charged for the aforesaid offences and tried before the court of Additional Sessions Judge, Surat. The prosecution examined the prosecutrix Sunderben PW-2, her mother Babliben PW-3, Dr. Saleja PW-7, who had examined her after the incident and Dr. Balubhai PW-1 to prove her age at Exh.7. Considering their evidence and defence of the accused, the learned Judge came to the conclusion that the prosecution proved its case against both the accused beyond reasonable doubt for the aforesaid offences, therefore, he convicted them and sentenced as stated earlier.

#. Learned counsel Shri Tirmizi for the appellants-accused firstly submitted that in the instant case the present appellants-accused are falsely involved by the prosecutrix at the instance of Ismailbhai because there was a political rivalry between Ismailbhai and father of accused. He submitted that in the instant case said Ismailbhai had gone along with prosecutrix and her mother for lodging complaint before Kosamba Police

Station, but he was deliberately not examined by the prosecution, therefore, adverse inference should have been drawn by the learned Trial court. It is true that the prosecution has not examined Ismailbhai in this case but that itself would not be a ground to come to the conclusion that merely because there was some political rivalry between the father of the accused and Ismailbhai the present appellants-accused have been falsely involved in this case. It is true that the prosecutrix Sunderben was working at the place of Ismailbhai but nobody would like to falsely depose against innocent persons merely because they had good relations with their master. Once doctor has supported the prosecutrix on the point of rape, then there is no reason for this court not to rely upon the evidence of the prosecutrix.

#. Learned counsel Shri Tirmizi for the appellants-accused submitted that evidence of prosecutrix Sunderben is not reliable and there is a major discrepancy regarding the injury and bleeding in her evidence and the evidence of doctor. It is true that the prosecutrix has stated in her evidence that at the time of incident stones pinched her, but she never stated that she received injuries because of that. It is also true that she had stated that blood had come out after she was raped but she must have washed it that is why the blood was not found by the doctor, who had examined her next day of the incident. Such minor discrepancies would not help the accused.

#. Mr.Tirmizi then submitted that there is a major discrepancy regarding the time in reaching police station between the evidence of prosecutrix Sunderben and her mother Babliben. Prosecutrix Sunderben stated that they reached the police station at 9.00 a.m. whereas Babliben stated that they reached at 8.00 a.m. They were illiterate people and no one can be exact about time. However, the argument of Mr.Tirmizi was that though both of them reached the police station early in the morning and FIR could be recorded only in the evening at about 5.30 p.m. He submitted that they took so much time because the whole case was concocted at their instance. This submission has no substance because it has come out in the evidence of I.O., P.S.I., Shri Gopalbhai PW-8 Ex.29 that they had to wait for the woman constable and that is why the prosecutrix and others were kept at police station for two days. It is true that prosecutrix Sunderben had stated that for 4-5 days they were kept in police station, but this is a minor discrepancy, which will not help the accused.

#. Lastly, Mr.Tirmizi submitted that no blood was found from the place of the incident, which is clear from the panchnama of the seen of offence. It is not necessary that blood in case of rape may also be found at the place of incident. In the instant case, when the prosecutrix was examined it has been clearly stated by the doctor that her hymen was ruptured recently. He also tried to argue that in panchnama only grass was shown whereas evidence of the prosecutrix Sunderben shows that there were some stones. All these things may not be minutely stated in the panchnama, when there is grass it has to be presumed that some small stones may be there. Such minor discrepancies would not affect the prosecution case if evidence of prosecutrix is duly corroborated by medical evidence.

#. In the instant case, the prosecutrix was admittedly below the age of 16. That part of the prosecution case was not challenged by the accused. In this type of cases, where a girl below 16 is literally dragged by two youngmen, then naturally she would not be able to shout or resist them.

#. In view of the above discussion, I do not find any error committed by the learned Judge in convicting the appellants-accused for the aforesaid offences.

#. Mr.Tirmizi, then submitted that sentence of 7 years R.I. imposed for the offence under Section 376 IPC is too harsh. He submitted that both the appellants-accused have almost undergone the sentence of 5 years, therefore, the sentence be reduced as sentence as already undergone. He submitted that initially at the time of admission of this appeal both the accused were not released on bail, but later on both the appellants-accused released on bail and presently they are on bail. He also submitted that the appellant-accused No.1 is a Tuberculosis patient whereas the appellant No.2 after being enlarged on bail got married and he has to maintain three unmarried sisters between the age of 37 to 45. He has got one more sister having paralysis and 80 years old widow mother and except him there is no one in his family to maintain them. He, therefore, submitted that either the order of sentence as already undergone be passed or they may be released on probation. For releasing them on probation, he gave reference of some judgments of the Division Bench of this court. In the said appeals the accused were given benefit of probation for the offence under Section 304 part II.

##. It may be stated that the accused, who are found

guilty for the serious offence like rape cannot be granted probation. I may state that not a single judgment of this court was produced by the learned counsel for the appellants on the point of probation. But assuming for the sake of argument that this court has released some of the accused by giving benefit under Probation of Offenders Act, that does not mean that the present appellants can be released on bail. Offences under Section 304 part II are different than the offence under Section 376 IPC. Offence under Section 304 Part II are individual offences whereas, under Section 376 is offence against society at large. Hence, the prayer regarding granting benefit of probation to the appellants-accused is out of question and it is accordingly rejected.

##. It is true that both the appellants-accused have by now remained in jail for almost 5 years but in my considered opinion that itself will not be a ground to reduce the sentence as already undergone. It is true that this court has discretion to impose sentence less than 7 years, but that discretion has to be exercised judiciously. In the instant case, the prosecutrix was belonging to Scheduled Caste community and she was below 16 years. She was literally dragged into the field and rape was committed on her. In such type of cases when the Trial court has thought it fit to impose sentence of 7 years, then this court should not interfere with such order of sentence. It may be stated that the offence under Section 376 IPC is punishable with life imprisonment. It may be true that the appellant accused No.1 is a Tuberculosis patient, but he can always be treated while remaining in jail for the said disease. It is true that the accused No.2 got married after he was enlarged on bail during the pendency of this appeal, but he took that risk. He was knowing fully well that his appeal is pending for final disposal and even though if he got married during pendency of this appeal, then he should not plead that now he should not be sent back to jail. It may be true that he may be having old widow mother aged 80 and three other unmarried sisters to maintain, but such persons should have thought twice before committing such heinous crime like rape. They have spoiled the life of an innocent girl below 16. Such type of persons do not deserve any leniency from this court on the point of sentence.

##. In view of the above discussion, this appeal fails and is hereby dismissed. The appellants, who are released on bail on a separate bail application are now ordered to surrender latest by 14.9.2001. Their bail

bonds stand cancelled.

(B.J.Shethna, J.)

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